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IN THE

SUPREME COURT OF THE UNITED STATES.

Term, 1953. No.

COMMONWEALTH OF PENNSYLVANIA

VS.

PHILIP OXMAN.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petition of PHILIP OXMAN respectfully represents:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Your Petitioner, a resident of Philadelphia, in Pennsylvania, on June 29, 1951, was arrested in his own automobile in the company of one NORMAN DELBOW, the owner of a gasoline station located at the intersection of 24th Street and Allegheny Avenue, in Philadelphia, Pa., and charged with setting up and maintaining a lottery. The arrest was

made shortly after midnight. The arrest was the result of earlier search for jewel robbers, in which your Petitioner was not involved. It was purely by chance that the policeman came upon the car in which your Petitioner was seated at the time of his arrest. The policeman did not claim to having seen any activity connected with a lottery, but merely stated he found on the person of the defendant or in his car certain papers, cash, etc.

On his person were found $1,400 in cash, and on the seat of the car between him and DELBOW was found a bag containing $16.29 and one pad with numerical notations and initials, which the police claimed were associated with the numbers game, and in the glove compartment of the car were found some pads (with no writing on) and cards which no witness identified as being associated particularly with the numbers game. The Commonwealth did not attempt to explain what activity at that hour could be associated with the numbers game which usually functions during the earlier hours of the day.

Petitioner explained the $1,400 and the pad on the seat of the car as representing the day's receipts in his instalment collection business.

The Petitioner was tried in the Quarter Sessions Court of Philadelphia County for setting up an illegal lottery, and having waived a trial by jury was found guilty by the Court (Carroll, J.) who dismissed Motions and Reasons for a New Trial and Arrest of Judgment and sentence was imposed on the defendant for a term of not less than 4 months to 2 years in the Philadelphia County Prison (reduced to one year by Superior Court) and asked to pay a fine of $500 and costs.

An Appeal was taken to the Pennsylvania Superior Court as of October Term, 1953, No. 122, and the conviction of the lower Court was affirmed.

A Petition for Allocatur was refused by the Supreme Court of Pennsylvania on September 8, 1953, and the present Petition for Certiorari is being filed with this Court to

review the action of the higher Court of Pennsylvania in refusing such Allocatur.

The purpose of the Appeal was to challenge the practice which has grown up in Pennsylvania of supporting Indictments setting up a lottery or the numbers game (as it is commonly called) by hearsay testimony in lieu of direct proof.

It is important to recall just what the real nature of the numbers game is. The best description of the game has been set forth in *Commonwealth vs. Chirico*, 117 Pa. Superior 199, which points out that the game itself as it is commonly played, involves at least four distinct operations:

1. The play;

2. The writing;

3. The collecting of slips and the money;

4. The paying off by the banker.

These four ingredients are indispensable and essential to establish the crime. There can be no proof of the setting up or management of a lottery without establishing, directly or indirectly, the existence of these four elements. It is naturally hard to assume that the defendant in any lottery case participates in more than one phase of the game. However, such participation and its connection with the system must be shown.

It is a well known fact that the operation of the numbers game is not necessarily confined in its operation to any specific area. The playing and the writing may be in one County, the paying off may be in another County. The burden remains with the Commonwealth to establish that the Court hearing the case has jurisdiction because the locus of the crime is always in issue and the Court has no jurisdiction of the offense unless committed in the County where tried:

Commonwealth vs. Tarnane, 170 Pa. Super. 265.

Assuming that the system of operating the numbers game is conducted under a cloak of secrecy, such as accompanies a conspiracy to defeat the law, the Commonwealth (in order to establish that the crime and all its four ingredients occurred in the County in which the cause was tried), would normally have to establish the existence of each of the four ingredients mentioned.

It may be conceded that the proof of venue may be by indirect evidence, circumstantial, and possession within the County of certain indications of gambling, may be an indication that the gambling occurred within that County: *Wharton's Criminal Evidence,* 11th Ed. Vol. 2, p. 1854, Sec. 1054.

Mere possession of the slips or other indicia of number writing (unless part of a huge establishment like that, for example which might be found in the back room of a barber shop, which is merely a front, and in which complete paraphernalia was found to operate the game), might be consistent with either innocence or guilt (in the latter case provided it was shown that the rest of the numbers game set-up demonstrated the existence of the four ingredients mentioned.)

Under the Pennsylvania law, in order to assure convictions, and to establish the four ingredients, it is now customary, for the arresting officer to establish that he found slips or pieces of paper on the defendant, or in the vicinity of the defendant, or in the defendant's house, on which appear certain notations which he, the arresting officer, claims he identifies as the symbols used in the numbers game. Under this method of proof he need not show that he observed the defendant actually writing the slips, collecting the slips, or receiving or paying any money therefor. Then he is permitted to testify (see *Commonwealth vs. Chirico,* supra), that from his experience as a police officer the other elements making up the four ingredients, must, of necessity, exist in the case, and that therefore, the defendant has set up and helped maintain a lottery even though no direct

proof can be shown that defendant ever wrote plays, picked up plays, or paid off on such plays. The officer thus becomes witness and jury.

In the present case the Pennsylvania Superior Court ruled out all of the counts of the Indictment, except one. The fifth count in the Indictment charged that defendant "was concerned in the management, conduct and carrying on of a certain lottery for monies, goods, wares, and merchandise." And the entire case was based upon facts purely circumstantial, but which did not rise to the dignity and quantity necessary to prove guilt beyond a reasonable doubt. Certain pads and money described above, whose nature and use was far from clear, and which defendant described as used in his own instalment business, plus the experience allegedly attributed to the defendant of his former association with the numbers business, was the sole basis of the lower Court's conviction.

The lower Court's opinion on the Motion for New Trial from the simple facts just given, describe the defendant as a "banker" and treat (as is done only too often in our State Courts), the arresting officer's testimony as sacrosanct, and to build up a case from what the Court assumed the circumstances suggested, rather than what the proven facts of the case demonstrated.

On the appeal to the Appellate Courts of Pennsylvania, it was challenged in this case that mere possession of the slips of paper, even if it were assumed that they were found on the person of the defendant, or in the possession or control of the defendant, is not sufficient to sustain a conviction without proof that the defendant was engaged in actually maintaining a lottery, or by truthful observation that he was actually acting as the writer or pay-off man (not merely a player).

The Superior Court of Pennsylvania, in its Opinion, said (pp. 2 and 3):

> "Defendant was arrested in Philadelphia on June 29, 1951, shortly after midnight, by police officers while he

was sitting in his automobile in the company of one Norman Dolbow. The arrest took place at a gasoline station frequented by defendant and operated by Dolbow, which had been raided previously by the police. On the front seat between the two men there was found a pad upon which were written various initials and numbers, and two bags containing approximately $16 in coins. In the glove compartment of the automobile were additional white pads and a quantity of pink cards described as 'cut cards.' It is common knowledge that they are used in the 'numbers game' or lottery. Defendant had on his person $1,407, and other white pads. These articles were identified as numbers paraphernalia, and they were in the possession of the defendant at the time of his arrest and were in fact his property. It was testified that the initials and numbers on the pad represented writers or pick-up men from whom collections were made, and that they were 'connected with the lottery game.' The cut cards were identified by defendant himself as being part of the 'numbers business,' in which he had been engaged previously. The cut cards contained the same numbers, and their use by those engaged in conducting an illegal lottery is to protect the 'bankers.' See Com. v. Chirico, 117 Pa. Superior Ct. 199, 207, 177 A. 591. Defendant admitted his experience with the numbers game; and he conceded having made the initials and numbers on the pads, but gave the explanation that they represented notes of collections made in his installment sales business. His mere statement that he was engaged as an installment salesman was unsubstantiated in any respect. The character of the property, the circumstances of possession, and defendant's admissions and inadequate explanation were sufficient for the trial judge to conclude that defendant was guilty."

The Opinion concedes that mere possession would not be enough if the pieces of paper were found in the car under

the seat or some other place where defendant have had no knowledge of their existence.

No opinion was filed by the Pennsylvania Supreme Court indicating its reasons in dismissing the Allocatur and in affirming the judgment of the Superior Court of Pennsylvania.

BASIS OF JURISDICTION.

The jurisdiction of the Court is sustained by the Due Process Clause of the 14th Amendment of the Federal Constitution.

QUESTIONS PRESENTED.

1. Is the defendant deprived of Due Process when the Court permits his conviction through testimony based on hearsay and experience rather than the actual observation of the arresting officer?

2. Is the defendant guaranteed Due Process by the method of proof which circumvents the common law by allowing, in effect, the presumption of illegality in the actions of the defendant where there is no direct proof of his doing so?

3. Can a citizen be convicted of setting up and maintaining a lottery based on mere proof (assuming the inferences be against him) of the possession of slips of paper, indicating their use in the numbers game?

4. Have the Courts usurped legislative power in allowing the informal rule of hearsay evidence to supplant legislative action, pointing out what constitutes the mode of proof necessary to sustain a conviction under the State and Federal Constitution?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

A wide breach exists between the decided cases in this State of earlier vintage and the present practice reflected in the following cases: In *Commonwealth vs. Mattera,* 151 Super. 135, where a defendant was charged with setting up and conducting a numbers game, 3 slips were found on the person or dropped by the defendant, slips of a kind which would not normally be in possession of a player, and the conviction was sustained, although the Court admitted "The evidence was not overly strong".

The arresting officer was permitted, as in the case of *Commonwealth vs. Chirico* above, to show the system of play. However, in *Commonwealth vs. Marino,* 142 Pa. Super. 327, the Superior Court refused to sustain a conviction where no numbers slips were found on the defendants' person and slips were found on the seat of the car driven by a co-defendant.

In *Commonwealth vs. Saeli,* 146 Super. 555, slips were found on the person of the defendant with numbers written on them, and the evidence indicated that he might be a player rather than a seller, and the Superior Court reversed the conviction.

In *Commonwealth vs. Wade,* 156 Pa. Super. Ct. 88, the police found a great number of plays on the person of the defendant, indicating he was a writer rather than a player,

and in his car was a very great number of plays which could only be associated with the numbers game. The Appellate Court affirmed the conviction and again permitted the policeman to testify as to the system.

In the case of *Commonwealth vs. Marino*, quoted above, the Superior Court adopted a new rule of evidence that in cases where the evidence is wholly circumstantial, a jury could convict where the circumstances proved are such as reasonably and as entirely justifying the inference of guilt of the accused, and should be of such volume and guilty as to overcome the presumption of innocence and satisfy the jury of the accused's guilt beyond a reasonable doubt.

In the case of *Commonwealth vs. Lanzetti*, 117 Pa. Super. 370, the Court sustained a conviction when it was shown that defendant had maintained an establishment complete in itself with all the paraphernalia associated therewith. In *Commonwealth vs. Zotter*, 131 Pa. Super. 296, the police actually bought plays from the defendant. The importance of this point is that the Courts in Pennsylvania are now taking short cuts to sustain convictions where there is no direct proof of the setting up and maintaining of a lottery. The natural explanation of this doctrine can only lead to the death knell of Due Process if expediency is to be the determining factor in supporting the convictions.

It will be conceded that the numbers game has become a social evil of tremendous importance, and suppression requires the combined efforts of all the enforcement agencies of the Commonwealth. Its ramifications are so wide spread and its participants are so scattered, that the player and the writer and the banker may never come together, and may be located at varying distant points in or out of the venue of the Court. The fact is that this circumstance has encouraged the Commonwealth to devise a scheme of proof by the mere fact that papers are found in possession of the defendant which might conceivably be used in the numbers game, and then establishing guilt by assumption that the rest of the conditions supporting a set up of the game must

have existed. This is the doctrine of "guilt by association", an insidious doctrine now more and more pervading the corpus juris of criminal evidence.

It might well be enunciated that if the Justices of this great tribunal should happen to carry on their person for the purpose of demonstration, slips of paper with the symbols usually associated with number playing, and although no one could, from the integrity of the Justices assume that they were either playing or writing numbers, should one of the Justices be apprehended in the Commonwealth of Pennsylvania and these slips found in his possession, his conviction could be potentially assured from the fact that the kind of slip that the Justice was carrying is one commonly used in the numbers game by the right of the arresting officer to describe that numbers game based on his (the arresting officer's) knowledge or experience of the system generally without any proof at all that the eminent Justice has been either a player or a writer, or how the specific lottery with which the Justice was allegedly associated, operated.

The Judicial system begins to decay when its manifest components of fairness and necessity for proving the actual commission of a crime are superseded by a subterfuge, and zealous officers can be permitted to "find" slips of paper on innocent defendants, or say they picked them up on the ground nearby; or to invade, as they do in Pennsylvania, men's homes without warrant and find on the table, where they might have been placed by anybody, characteristic slips of paper as herein described, and then by drawing on their fruitful imaginations of how the numbers game operates, bring about a conviction of the proprietor or proprietors of that home, including the wife, which tempts the policeman to resort, if need be, to perjury, to obtain a conviction.

Your petitioner took his appeal to the highest Court of Pennsylvania, without success, in an effort to point out the evils of this judicial short cut. Due Process is definitely lacking when a defendant is denied his day in Court, in accordance with established principles of Justice under our

common law. The need for suppressing the traffic should not be permitted to establish a rule of expediency that may subsequently cause a breach in other existing methods of proving guilt beyond a reasonable doubt.

Respectfully submitted,

HARRY R. BACK,
Attorney for Petitioner.

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FILED

FEB 2 1954

HAROLD B. WILLEY, Clerk

In the Supreme Court of the United States

October Term, 1953. No. 525

PHILIP OXMAN

v.

COMMONWEALTH OF PENNSYLVANIA

On Petition for a Writ of Certiorari to the Superior Court of Pennsylvania.

BRIEF FOR THE COMMONWEALTH OF PENNSYLVANIA IN OPPOSITION

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OPINION BELOW

The opinion of the Superior Court of Pennsylvania is reported in 173 Pa. Super. 482 (1953).

JURISDICTION

The judgment of the Superior Court of Pennsylvania was entered on July 14, 1953. The Supreme Court of Pennsylvania denied allocatur on September 8, 1953. Petition for a writ of certiorari was filed on January 9, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1257(3). See also Rules 38 and 38½ of the Rules of this Court.

ARGUMENT

The issues upon which petitioner bases his petition for a writ of certiorari appear on page 7 of his petition and brief. All of these questions actually involve the single issue of the sufficiency of the evidence in the state criminal proceedings to support the conviction of petitioner for being concerned in the management, conducting and carrying on of an illegal lottery. This Court has repeatedly held that it has no jurisdiction to review the decision of a state appellate court interpreting the state's rules of evidence and passing upon the sufficiency of the evidence in a state judicial proceeding. *Bell Telephone Company of Pennsylvania v. Pennsylvania Utility Commission*, 309 U. S. 30 (1940); *Barrington v. Missouri*, 205 U. S. 483 (1907) Since the questions raised by petitioner deal solely with the sufficiency of the evidence in a state criminal proceeding, the petition for a writ of certiorari does not present a Federal question for review by this Court, and should be denied.

Respectfully submitted,

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District Attorney

MICHAEL VON MOSCHZISKER
First Assistant District Attorney

SAMUEL DASH
Assistant District Attorney